Supreme Court, U.S.
FILED
APR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., and THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONERS

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Dated: April 13, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONERS

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate officer or owner cannot be personally liable for delinquent contributions to an employee benefit fund under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil or proof of alter ego status.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interests of multiemployer pension and welfare plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws. Petitioners and Respondents have consented to the filing of this brief.

The NCCMP has been recognized as having had a "significant impact" on the development of the Multiemployer Pension Plan Amendments Act of 1980 * by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980); 126 Cong. Rec. S10100 (daily ed. July 29, 1980). The NCCMP's participation as an *amicus curiae* has been acknowledged by this Court. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 215 n.1 (1986).

More than 190 multiemployer plans and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families. An acknowledged characteristic of multiemployer plans is that many of their participating employers have far less than 100 employees. In many cases, these employers are closely-held corporations in which the owner/operators, as a matter of economic reality, make all the decisions for the corporation and are involved in the day-to-day operations, including the decision whether to make timely benefit plan contributions.

A number of industries (*e.g.*, federal service contracts, building and construction) covered by multiemployer plans are characterized by highly mobile employers—employers that can easily go in and out of business and

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* Pub. L. 96-364, 94 Stat. 1208-1311 (1980).

change identity. These employers typically own little or no real estate or equipment, and they are thinly capitalized. Any judicial decision that erodes the plans' ability to collect contributions from such employers erodes the financial stability of multiemployer plans.

Because of the broad range of experience of the NCCMP's constituency and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants and beneficiaries of such plans.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See id.*; 29 U.S.C. § 1001a. The decision below is contrary to these Congressional goals.

As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of more than nine million plan participants and their families, and the federal program that insures certain of these benefits.

The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension and welfare benefit plans is the implementation of an

ongoing system to collect employer contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which the employees labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

REASONS FOR REVIEW

A.

The purpose of multiemployer benefit plans and the policy underlying the statute which regulates these plans are one and the same: to protect the interests of plan participants and to ensure the receipt of promised benefits. *See* 29 U.S.C. §§ 186(c)(5), 1001(b). The assets of multiemployer benefit plans consist initially of employer contributions, which trustees have a statutory duty to try to collect. *See* 26 U.S.C. § 412; 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145. *See also Diduck v. Kaszycki & Sons Contractors*, 874 F.2d 912 (2d Cir. 1989) (holding trustees of multiemployer plan breached fiduciary duty by failing to try to collect delinquent contributions).

ERISA, was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) (holding corporate officer personally liable under ERISA for delinquent contributions to extent he conspired to

divert contributions from the plan). To implement this policy, ERISA "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. § 1001(b).

ERISA, as enacted in 1974, provided a cause of action for multiemployer plan trustees to collect delinquent contributions. *See, e.g., National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1219-20 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Moreover, ERISA, as enacted in 1974, provided a basis for holding a dominant corporate owner/officer personally liable for payment of delinquent contributions, without resort to judicial corporate veil-piercing, *Laborers' Fringe Benefit Fund—Detroit and Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1352-53 (6th Cir. 1981). In *Northwest Concrete*, the Sixth Circuit reversed the district court's refusal to enjoin the corporation and the individual from future failures to contribute; the district court's judgments against the owner/officer personally and against his corporation were not challenged on appeal. In fact, the Sixth Circuit opinion states that the owner/officer had been ordered to pay delinquent contributions in other cases, too. *Id.*, 640 F.2d at 1353 n.4.[1]

In 1980, ERISA was amended.[2] These amendments were prompted by Congressional anxiety about the finan-

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[1] In the recent case of *Scarbrough v. Perez*, 870 F.2d 1079 (6th Cir. 1989), the court refused to find a sole shareholder of an employer's corporate parent liable for contributions under ERISA Section 515. *Ipse dixit*, the Sixth Circuit held that *Perez* was not inconsistent with its earlier ruling under ERISA Section 502 in *Northwest Concrete*.

[2] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208-1311 (1980). Although *Northwest Concrete* and *Commercial Roofing* were finally decided after ERISA was amended, both cases were brought and decided under the provisions of ERISA as enacted in 1974. The NCCMP

cial stability of multiemployer plans and concerns that the maintenance and growth of such plans were being discouraged. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Nowhere in these amendments is there an express repeal of the aforementioned ERISA cause of action to collect delinquencies from corporations and their dominant owner/officers. And, "it is a venerable rule, frequently reaffirmed by the Supreme Court that repeals by implication are not favored and will not be found unless an intent to repeal is 'clear and manifest.'" *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1984) (citations omitted).

The 1980 amendments were designed, *inter alia*, "to strengthen the funding requirements and enhance the financial stability of multiemployer . . . plans," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981), by assuring that trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1145.

The drafters of the 1980 amendments to ERISA expressly focused on five judicial decisions:

> In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F.

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was an active participant in the fashioning of ERISA remedies for delinquent contributions. *See Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919, 926 n.8 (E.D. Mich. 1981).

> Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097 (USDC D.C., April 22, 1980) are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23,288 (1980) (statement of Sens. Williams and Javits). One of the cases cited by the Congressional drafters—*Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*—involved the personal liability of an owner/officer for delinquent contributions.[3]

The Seventh Circuit, without reference to the foregoing caselaw, concluded that a corporate officer or manager may come within ERISA's broad definition of "employer," 29 U.S.C. § 1002(5) and still not be liable for contributions. Rather, in affirming the district court's decision in the instant case, the Seventh Circuit relied on *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). "Only an 'employer *who is obligated to make contributions to*' a plan under an agreement need do so. Such an employer must make contributions 'in accordance with the terms and conditions of such plan or such agreement.' Even if a manager or other officer is an 'employer' under ERISA § 3(5), the plan or other agreement still governs what each must do, for not all 'employers' are 'obligated to make contributions' under the 'terms and conditions' of a plan or agreement." *Levit*, 874 F.2d at 1193 (emphasis in original).

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[3] It is unclear from the *McDowell* opinion whether the owner/officer's business were incorporated. The district court's decision, denying the multiemployer fund its sought-after relief, was "considered to be incorrectly decided" by the drafters of the 1980 Amendments to ERISA. The decision of the district court was eventually reversed, 673 F.2d 1341 (9th Cir. 1982).

The Seventh Circuit's interpretation of ERISA Section 515, 29 U.S.C. § 1145 is at odds with the pre-MPPAA decisions enforcing the obligation to contribute against owner/officers, as in *Northwest Concrete*, under ERISA Section 502, 29 U.S.C. § 1132(a). For, Section 502 does not contain the language that the Seventh Circuit found to be controlling, *i.e.*, "employer *who is obligated to make contributions*," ERISA Section 515 (emphasis supplied).

Instead, Section 502 permits trustees to sue any employer to prevent violations of ERISA and to enforce the obligation to contribute. And, "[s]urely, the intentional evasion of responsibility for employee pensions violates ERISA; otherwise, it becomes a social cost for which we all must pay." *Rockney v. Blohorn*, 877 F.2d 637, 644 n.1 (8th Cir. 1989) (Heaney, J., dissenting). Nothing in ERISA Section 502 requires that the liable employer actually be the signatory to the collective bargaining agreement.

It defies logic and reason to conclude that by adding Section 515 to ERISA in 1980 to enhance collection efforts, Congress intended to create an enforcement mechanism that was more restrictive than the extant provision of ERISA. Rather, the reference to the obligation to make contributions in ERISA Section 515 is a recognition of the statutory prerequisites of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5).

C.

The Seventh Circuit's decision in *Levit* and the instant case conflict with the recent decisions in *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) and *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953 (D. W.Va. 1988).[4]

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[4] The D.C., First and, Third Circuits have refused to find corporate owner/officers liable as "employers," under ERISA Section

The Second Circuit in *Leddy* held a corporate official "individually liable under Section 502 of ERISA, 29 U.S.C. § 1132, just as he would be liable for unpaid minimum wages under FLSA, even if the traditional conditions for piercing the corporate veil are not met" under circumstances where the corporate officer "defrauds or conspires to defraud a benefit fund of required contributions" and thereby "deliberately flouts ERISA obligations." *Leddy*, 875 F.2d at 388. *See Local 445 Welfare Fund v. Wein*, 855 F.2d 62 (2d Cir. 1988) (affirming order holding corporate owner/officers liable for delinquent contributions under New York debtor/creditor law and awarding attorney fees under ERISA).

In *Ball Electric*, the court held the controlling corporate officer liable for unpaid contributions to an employee benefit fund under ERISA, without piercing the corporate veil. The court held that "while a corporate officer may not be an employer in the traditional sense, he may be one in statutory terms," 685 F. Supp. at 955.

The federal courts have had no difficulty in finding corporate officers liable under ERISA for fiduciary breaches, including fiduciary breaches for the failure to make contributions to employee benefit plans. *Pension Benefit Guaranty Corp. v. Solomsen*, 671 F. Supp. 938 (E.D. N.Y. 1987); *Pension Benefit Guaranty Corp. v. Greene*, 570 F. Supp. 1483, 1495-96, 1499-500 (W.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984). *See also Blatt v. Marshall and Lassman*, 812 F.2d 810 (2d Cir. 1987); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979). And, the liability imposed in these cases is personal liability.

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515. *International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988); *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988); *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

Similarly, a controlling corporate officer who makes false statements in a contribution report to reduce the corporation's obligation to contribute can be fined or jailed. *United States v. S. & Vee Cartage Co.*, 704 F.2d 914 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983). But, according to the decision below, that corporate officer could not be required to pay the corresponding delinquent contributions in a civil suit under ERISA Section 515.

Since long before the enactment of ERISA, the judiciary has acknowledged "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). *See Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) and cases cited therein. And, regarding the personal liability of corporate owner/officers under ERISA, ERISA "cannot be said to attach great weight to corporate form." *Danin*, 801 F.2d at 2.

National employee benefits policy underscores that "the continued well-being and security of millions of employees, retirees and their dependents are directly affected by multiemployer pension plans," 29 U.S.C. § 1001a. Therefore, the Congress has not only endeavored to foster employee benefit plan continuation and growth, but it has also established "that minimum standards be provided assuring the financial soundness" of these plans, 29 U.S.C. § 1001(a).

Contributions are the life-blood of employee benefit plans. Consequently, the failure to make contributions constitutes irreparable harm to plans. *See Northwest Concrete*, 640 F.2d at 1352; *Painters Pension Fund v. Hartline-Thomas, Inc.*, 4 Employee Benefits Cas. (BNA) 1199, 1200 (D.D.C. 1983); *Central States, Southeast and*

Southwest Areas Pension & Health and Welfare Funds v. McNamara Motor Express, Inc., 503 F. Supp. 96, 98-99 (W.D. Mich. 1981); *Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979). When an employer—acting through its dominant owner/officer—is able to avoid paying contributions to welfare benefit plans, plan participants are denied the medical and other benefits for which they labored. For, the plans generally cannot provide benefits that the employer refused to fund.

Trustees are interested in maximizing the collection of delinquent contributions, and thereby ensuring the uninterrupted payment of benefits. So it is that in the many years that the NCCMP has been in existence, not one of the hundreds of plan trustees represented by the NCCMP—trustees appointed by labor and by management—has ever requested that the NCCMP take a position against personal liability of corporate owner/officers. Neither have any of the millions of plan participants and beneficiaries made such a request. For, the imposition of liability on corporate owner/officers enhances, rather than detracts, from the financial stability of multiemployer plans.

D.

The Seventh Circuit acknowledges that ERISA's definition of "employer" is patterned upon the Fair Labor Standards Act ("FLSA") definition. *Levit*, 874 F.2d at 1193. Yet, the Seventh Circuit has ignored the reasoning of the judicial decisions under the FLSA, even though that Act, like ERISA, defines an "employer" as one who acts "directly or indirectly in the interest of an employer. . . ." 29 U.S.C. § 203(d). The FLSA provides *inter alia* that "[e]very employer shall pay [minimum wages] to each of his employees. . . ." 29 U.S.C. § 206(a).

Between the enactment of the FLSA and the enactment of ERISA in 1974, the federal judiciary had numerous opportunities to determine the scope of the term "employer" under the FLSA, which requires that "[e]very employer shall pay to each of his employees . . ." a prescribed minimum wage, 29 U.S.C. § 206(a). Often was it argued that since the corporation—not its owner/officer—has employees, only the corporation has the obligation "to pay" described in the FLSA. Yet, in determining who was an "employer" with an obligation "to pay" under the FLSA—*i.e.*, whether only the corporation or also the owner/officer—this Court has adopted an "economic reality" test. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (recognizing the "expansiveness" of the FLSA definition of "employer"). *See also Falk v. Brennan*, 414 U.S. 190, 195 (1973). *Accord NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (similar definition of "employer" under NLRA "to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications"). As under ERISA, the liability imposed under the FLSA is for an employer's statutory and contractual obligations. *See* 29 U.S.C. §§ 207(a)(1), 216(b); 29 C.F.R. §§ 778.108-778.110 (1987) (personal liability for wages calculated at time and one-half the regular rate of pay specified in the collective bargaining agreement).

ERISA, like the FLSA, is an integral component of national labor policy. While the FLSA guarantees a minimum wage to employees, ERISA guarantees that earned fringe benefits will not be lost. It is essential that national labor policy be consistent in protecting the earnings of employees. After an employee has put in a day's work he or she is entitled to a day's pay. The corporate form should not be permitted to "defeat overriding federal legislative policies." *Danin*, 801 F.2d at 3.

The analysis under the FLSA has focused on "the totality of the circumstances, underscoring the economic realities of the workers' employment." *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir.), *cert. denied*, 463 U.S. 1207 (1983). "[I]t is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case." *Id.*, 695 F.2d at 195, *citing Goldberg v. Whitaker House Coop. Inc.*, 366 U.S. 28 (1961).

The Seventh Circuit points to the fact that nothing in the legislative history of ERISA indicates a Congressional intent to hold corporate officers liable for the contributions that they decide to make or keep. Yet, nothing in the legislative history of the FLSA indicated any such intent, either. Nonetheless, "[t]he Supreme Court has termed [the FLSA's] employer definition 'expansive' and has held that 'managerial responsibilities' and 'substantial control of the terms and conditions of the [employer's] work' create statutory employer status." *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir. 1984) (*quoting Falk v. Brennan*, 414 U.S. 190, 195 (1973)).

Yet, the Seventh Circuit in the instant case, honoring form over substance, refused to hold an individual personally liable under ERISA for failure to make contributions to a multiemployer plan, even though this selfsame individual satisfies the court—fashioned FLSA economic reality test, under which he would be liable as the "employer" with the obligation to "pay," 29 U.S.C. § 206(a).

CONCLUSION

To hold that dominant corporate owner/officers can escape liability for delinquent contributions, notwithstanding the broad scope of the ERISA definition of "employer," undermines "ERISA's interlocking, interrelated and interdependent remedial scheme, which is

. . . part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). For, "[h]aving heard the music, he must pay the piper." *Jim McNeff, Inc. v. Todd*, 461 U.S. at 260, 271 (1983).

For the foregoing reasons and in recognition that ERISA, too, "must be read in the light of the mischief to be corrected and the end to be attained," *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940), the NCCMP respectfully urges this Court to review the decision of the court below.

Respectfully submitted,

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